Supreme Court, U.S.
FILED

No. 99-

DEC 10 1999

IN THE

# Supreme Court of the United States

OFFICE OF THE CLERK

JOSEPH SPENCER,

*Petitioner,*

v.

KNAPHEIDE TRUCK EQUIPMENT COMPANY,

THE BOARD OF POLICE COMMISSIONERS OF THE KANSAS CITY, MISSOURI POLICE DEPARTMENT, THROUGH ITS MEMBERS: DR. STACY DANIELS, IN HER OFFICIAL CAPACITY AS VICE PRESIDENT, BOARD OF POLICE COMMISSIONERS; JEFFREY J. SIMON, IN HIS OFFICIAL CAPACITY AS TREASURER, BOARD OF POLICE COMMISSIONERS; JOSEPH J. MULVIHILL, IN HIS OFFICIAL CAPACITY AS A MEMBER, BOARD OF POLICE COMMISSIONERS; EMMANUEL CLEAVER, IN HIS OFFICIAL CAPACITY AS EX OFFICIO MEMBER, BOARD OF POLICE COMMISSIONERS AND MAYOR, CITY OF KANSAS CITY, MISSOURI,

AND

KNAPHEIDE MANUFACTURING COMPANY,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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62pp

## QUESTIONS FOR REVIEW

I. WHAT IS THE STANDARD OF CULPABILITY FOR A MUNICIPAL POLICE DEPARTMENT THAT ENGAGES IN THE DESIGN AND MANUFACTURE OF MOTOR VEHICLES FOR THE TRANSPORTATION OF ARRESTED PERSONS, WHEN THE VEHICLES DO NOT COMPLY WITH THE FEDERAL MOTOR VEHICLE SAFETY STANDARDS, OR PROVIDE ANY MEASURES FOR THE SAFETY OF PERSONS TRANSPORTED THEREIN, AND THE DEFECTIVE DESIGN CAUSES THE PLAINTIFF TO BE RENDERED QUADRIPLEGIC IMMEDIATELY AFTER HIS ARREST FOR SIMPLE ASSAULT DURING HIS TRANSPORTATION TO THE POLICE STATION?

II. WHERE A 1983 PLAINTIFF ALLEGES THAT HIS CONSTITUTIONAL INJURY OCCURRED AS THE RESULT OF A MUNICIPAL ENTITY'S DISREGARD OF OBVIOUS NEEDS OR RISKS, DOES HE HAVE TO DEMONSTRATE PRIOR SIMILAR INJURIES TO SHOW THAT THE ENTITY HAD NOTICE OF THE RISK OR NEED, AND IF SO WHAT CONSTITUTES NOTICE?

III. WHAT STANDARD IS USED TO JUDGE MUNICIPAL CULPABILITY WHERE THE MUNICIPALITY HAS IDENTIFIED OFFICIAL POLICY THAT POSES A RISK OF HARM AND HAS TAKEN INEFFECTIVE REMEDIAL ACTION SUCH THAT FURTHER HARM OCCURS?

IV. IS THE IMPOSITION OF SUMMARY JUDGEMENT, ON THE ISSUE OF A MUNICIPALITY'S DELIBERATE INDIFFERENCE, APPROPRIATE IN A SECTION 1983 ACTION WHERE THE PLAINTIFF WAS RENDERED QUADRIPLEGIC AS A RESULT OF BEING TRANSPORTED IN A PADDY WAGON WHICH POSED OBVIOUS RISKS TO OCCUPANTS BECAUSE IT LACKED SEATBELTS, PADDING OR ANY OTHER MEASURES TAKEN TO INSURE SAFETY?

## TABLE OF CONTENTS

*Page*

Questions Presented ..... i

Table of Contents ..... iii

Table of Authorities ..... vi

Opinions Below ..... 1

Statement of the Basis of Jurisdiction of the Supreme Court ..... 1

Constitutional, Statutory And Ordinance Provisions Involved in This Case ..... 1

Statement of the Case ..... 5

Reasons for Granting the Writ ..... 13

*Page*

I. WHAT IS THE STANDARD OF CULPABILITY FOR A MUNICIPAL POLICE DEPARTMENT THAT ENGAGES IN THE DESIGN AND MANUFACTURE OF MOTOR VEHICLES, FOR THE TRANSPORTATION OF ARRESTED PERSONS, WHEN THE VEHICLES DO NOT COMPLY WITH THE FEDERAL MOTOR VEHICLE SAFETY STANDARDS, OR PROVIDE ANY MEASURES FOR THE SAFETY OF PERSONS TRANSPORTED THEREIN, AND THE DEFECTIVE DESIGN CAUSES THE PLAINTIFF TO BE RENDERED QUADRIPLEGIC IMMEDIATELY AFTER HIS ARREST FOR SIMPLE ASSAULT DURING HIS TRANSPORTATION TO THE POLICE DEPARTMENT? ..... 13

II. WHERE A 1983 PLAINTIFF ALLEGES THAT HIS CONSTITUTIONAL INJURY OCCURRED AS THE RESULT OF A MUNICIPAL ENTITY'S DISREGARD OF OBVIOUS NEEDS OR RISKS, DOES HE HAVE TO DEMONSTRATE PRIOR SIMILAR INJURIES TO SHOW THAT THE ENTITY HAD NOTICE OF THE RISK OR NEED, AND IF SO WHAT CONSTITUTES NOTICE? .... 17

*Page*

III. WHAT STANDARD IS USED TO JUDGE MUNICIPAL LIABILITY WHERE THE MUNICIPALITY HAS IDENTIFIED OFFICIAL POLICY THAT POSES A RISK OF HARM AND HAS TAKEN INEFFECTIVE REMEDIAL ACTION SUCH THAT FURTHER HARM OCCURS? ..... 18

IV. IS THE IMPOSITION OF SUMMARY JUDGMENT, ON THE ISSUE OF A MUNICIPALITY'S DELIBERATE INDIFFERENCE, APPROPRIATE IN A SECTION 1983 ACTION WHERE THE PLAINTIFF WAS RENDERED QUADRIPLEGIC AS A RESULT OF BEING TRANSPORTED IN A PADDY WAGON WHICH POSED OBVIOUS RISKS TO OCCUPANTS BECAUSE IT LACKED SAFETY BELTS, PADDING OR ANY OTHER MEASURES TAKEN TO INSURE SAFETY? ..... 19

CONCLUSIION ..... 20

APPENDIX

U.S. Court of Appeals, Eighth Circuit decision affirming Summary Judgment of District Court ..... 1a

Memorandum and Order dated June 17, 1997 from United States District Court granting judgment .... 11a

U.S. Court of Appeals Eighth Circuit denial of Spencer's Motion for Rehearing before the panel and Spencer's Motion for Rehearing En Banc. ..... 33a

## TABLE OF AUTHORITIES

*Page(s)*

**CASES**

*Board of County Commissioners v. Brown*, 117 S.Ct. 1382 (1997) ..... 14, 15, 16

*City of Canton Ohio v. Harris*, 489 U.S. 378 (1989) . 16, 17, 19

*City of Revere v. Massachusetts General Hospital*, 463 U.S.239, 244 (1983) ..... 16

*Farmer v. Brennan*, 114 S.Ct. 1970 (1983) ..... 16, 17, 19

*Monell v. N.Y. Dept. of Social Services*, 436 U.S. 658 (1978) ..... 14, 20

**STATUTES**

42 U.S.C. Section 1983 ..... 9,11, 14,15,19

49 C.F.R. Section 571.208 ..... 6, 9, 10, 13, 14, 15, 16

49 U.S.C. 30101 & 30111 ..... 6, 9, 10, 13, 14, 15, 16

## OPINIONS BELOW

The decision of the United States District Court, Western District of Missouri, is set forth in the Appendix at 11a-32a but is unreported. The opinion of the United States Court of Appeals for the Eighth Circuit is set forth in the Appendix at 1a - 8a and is reported at 183 F.3d 902 (8th Cir. 1999)

## STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. 1254. The statutory provision for jurisdiction of the United States District Court for the Western District of Missouri was 28 U.S.C. Sections 1331 and 1332. The United States District Court for the Western District of Missouri granted summary judgment dismissing portions of the plaintiff's case on June 17, 1997. An appeal was filed to the United States Court of Appeals for the Eighth Circuit. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's summary judgment. Panel rehearing and rehearing en banc were timely requested. Rehearing was denied on September 13, 1999. This Petition was filed within 90 days of the panel rehearing denial, and is thus timely.

## CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

### 42 U.S.C. 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

### U.S.C. AMENDMENT V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in the time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal cause to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

## U.S.C. AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## U.S.C. AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and out of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## TITLE 49 U.S.C. SECTION 30101 SUBCHAPTER 1

"The purpose of this act is to reduce traffic accidents and deaths and injuries resulting from traffic accidents. Therefore it is necessary-

(1) to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and

(2) to carry out needed research and development."

## TITLE 49 U.S.C. SECTION 30111 SUBCHAPTER 2

"(a) General requirements: The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor safety, and be stated in obvious terms.

**49 C.F.R. SECTION 571.208; S4.2.1 OCCUPANT CRASH PROTECTION.**

Trucks and multipurpose vehicles with a GVWR of 10,000 pounds or less, manufactured on or after January 1, 1976 and before September 1, 1991;

"Each truck and multipurpose passenger vehicle, with a gross vehicle rating of 10,000 pounds or less, manufactured before September 1, 1991, shall meet the requirements of S4.1.2.1 or at the option of the manufacturer S4.1.2.2 or S4.1.2.3 (as specified for passenger cars), except that forward control vehicles manufactured prior to September1, 1981, convertibles, open-body type vehicles, walk-in van-type trucks, motor homes, vehicles designed to be exclusively sold to the U.S.Postal Service, and vehicles carrying chasis-mount campers may instead meet the requirements of S4.2.1.1 or S4.2.1.2.

S4.2.1.1 First option-complete automatic protection system. The vehicle shall meet the crash protection requirements of S5 by means that require no action by vehicle occupants.

S4.2.1.2 Second option-belt system. The vehicle shall have seat belt assemblies that conform to Standard (49 CFR 571.209) installed as follows: (a) A Type 1 or Type seat belt assembly shall be installed for each designated position in convertibles, open-body type vehicles and walk-in type trucks.

## STATEMENT OF THE CASE

At some point in the late 1970s the Kansas City Missouri Police Department determined that it needed to replace it's existing paddy wagons with a new design. The model that they used, at that time, was based on a panel truck that was specially converted to carry prisoners. The panel trucks were considered unsuitable because they only lasted a year or two before they wore out. When a replacement was purchased it had to be converted, prior to use, and this was a costly and time consuming process. In 1978, the head of the Police Department's Maintenance Department was assigned the task of developing a suitable replacement. With the help of various individuals within the Department and after consulting with a couple of local body equipment manufacturers, the department developed specifications for a motor vehicle that would suit it's needs. The new paddy wagon would be a 3/4 ton pickup truck with a prisoner compartment mounted in place of the normal pickup bed. The prisoner compartment was to be made of heavy, durable materials which could be expected to outlast the normal service life of the truck on which it was mounted. When the truck wore out, the prisoner compartment would be transferred from the old truck chassis on to the new one, with a minimum of time and money involved. The design specifications were approved by the Board of Police Commissioners and a bidding process was initiated which was open to all interested Truck Service Body Manufacturers and their representatives in the Metropolitan Kansas City Area. The Bid Invitations were extremely precise in their specifications. Everything from the dimensions of the

compartment to the type and thickness of the materials were set out. The Board had it's design and was looking for a company to build it for them. The Board selected Knapheide Manufacturing Company, as having the best and lowest bid, and awarded them the contract to build the prisoner compartment.

During the process of creating the new design specifications, no one checked to insure that the design conformed with the Federal Motor Vehicle Safety Standards. During the creation of the new design specifications, no consideration was given to the safety of the persons who would be transported in the paddy wagons. The head of the project stated that prisoner safety simply was not a concern in the design of the paddy wagons. When Knapheide employees enquired about putting seatbelts into the units, the Police Department told them that they did not want them. The Police Department also declined a variant of the wagon which would have padding for some prisoners. The resulting product was a steel box devoid of handholds, seatbelts, padding, heating or air conditioning.

The new paddy wagons were put into service sometime during the spring or summer of 1980. Reports of injuries quickly began to mount. For the sake of clarity, the names of those persons injured and the dates on which they were injured are listed in chronological order below.

9-15-80 Freddie Watson
11-12-80 Howard Lowe
10-22-81 Henry Williams
10-15-82 John St. Johns
6-24-83 Ted Guthrie
6-30-83 Mark Hernandez
2-27-88 Roger Huschka
4-22-88 James Carter
4-26-88 Steve Holden
1-1-89 Raymond Mcgee
1-12-89 Russell Pitts
3-19-89 O'Dell Collins
2-13-90 Richard Page-Bey
8-17-91 Carmen Riggs
***1-30-92 Joseph Spencer***

The reported injuries varied in severity. One person reported being hospitalized for treatment of her injuries. Another person reported suffering a broken wrist. Others reported bruises and cuts to different parts of their bodies. All of the complaints had a common theme. Each person had been arrested by the Kansas City, Missouri Police Department, handcuffed with their hands behind them and transported to a local police station in the steel box paddy wagons. All reported that it was impossible to maintain their balance, or to remain seated in the wagons during transport. All reported being thrown about inside the wagon during their transport as the paddy wagon made it's way through city traffic. At least three of the complaints were of head or facial injuries. The Kansas City, Missouri Police Department and it's Board of Police

Commissioners were aware of the injuries in the wagons. In 1984 the Board put into place procedural instructions urging paddy wagon drivers to use caution when transporting prisoners in the wagons and to seat prisoners at the front of the wagon. Reports of injuries continued to accrue despite the remedial effort. Eight further complaints were received and the Kansas City, Missouri Police Department, and it's Board of Police Commissioners, took no further remedial action.

On January 30th, 1992, the plaintiff, Joseph Spencer was arrested on a simple assault charge. He was handcuffed with his hands behind him and placed in a steel box paddy wagon for transport to a local police station for formal charging. During a ride of about three miles, he was tossed about in the prisoner compartment as the wagon turned, stopped and started. At some point during the ride he was thrown forward into the steel bulkhead of the wagon and was rendered quadriplegic.

Over the next seven years Mr. Spencer was represented by several different lawyers. At one point, an action was filed in state court. That was later dismissed and an action was brought in the United States District Court for the Western District of Missouri. The Complaint named Knapheide Truck Equipment Company, Knapheide Manufacturing of Illinois and The Board of Police Commissioners of the Kansas City, Missouri Police Department, as defendants.

Knapheide Truck Equipment Company and Knapheide Manufacturing of Illinois were sued under a products liability theory that the wagon was unreasonably dangerous as manufactured, and negligence theories of failing to equip the paddy wagons with safety belts, as required by the National Traffic and Motor Vehicle Safety Act, and negligent failure to recall, or to retrofit, the paddy wagons with safety belts.

Three claims were made against the Board of Police Commissioners. The first claim was a state tort claim of maintaining a dangerous condition of property, to wit the paddy wagon. The second and third claims were brought under 42 U.S.C. Section 1983 and alleged that the Board's policies of purchasing and using the paddy wagons, in conjunction with it's policies of handcuffing and transporting intoxicated prisoners in the wagons violated the plaintiff's Fifth and Fourteenth Amendment liberty rights and constituted punishment of pretrial detainees.

At the close of discovery both defendants tendered summary judgement motions to the Court. The plaintiff's negligence claims against the Knapheide defendants were dismissed under an acceptance doctrine. The District Court found that the Knapheide defendants were merely contractors who had built the paddy wagons to the Board's specifications and that their liability for negligence ended when the Board accepted the paddy wagons. Using similar logic, the Court stated that normally a mere contractor is not liable under products liability theories for the manufacture of dangerously defective products which they have built to a customer's

specifications. The court stated that absent a glaring deficiency in the specifications provided, a contractor has no duty to evaluate the safety of customer-provided designs. The Court further found that the products liability issue, of failing to equip the paddy wagons with safety belts, was preempted by the National Traffic and Motor Vehicle Safety Act. That Act would require safety belts for prisoners if the vehicle were designed to carry ten or less persons but would not require them if the wagons were designed to carry more than ten persons. If the paddy wagons were designed to carry more than ten persons, they would be classified as a bus under the Act. Busses do not have to have safety belts. The Court did find that a factual issue existed which precluded summary judgement, on the failure to install seatbelts claim, for the Knapheide defendants. That issue involved the role of Knapheide in the decision not to equip the paddy wagon with safety belts. The Board maintained that it had relied upon Knapheide to determine whether seatbelts were required by the National Traffic and Motor Vehicle Safety Act. Knapheide maintained that it had suggested seatbelts, but that the Board had adamantly refused to have them installed in the paddy wagons. This dispute, as to Knapheide's involvement in the decision to forego safety belts in the wagons, precluded complete summary judgement, but left the plaintiff in a very tenuous position. In order to prevail against Knapheide in trial, the plaintiff would have to prove that Knapheide had made the decision to omit the seatbelts from the wagons, not the Board, as Knapheide alleged; that the paddy wagons were not busses under the Act; and that the lack of safety belts had caused the plaintiff's

injuries. The District Court Judge described the plaintiff's predicament as " being on thin ice which could break at any time". *See* footnote 17, appendix p.32a.

The District Court granted the Board of Police Commissioner's Motion for Summary Judgment on the Section 1983 claims. The Court found that the plaintiff had failed to demonstrate a prior pattern of constitutional violations in regard to the Board's policies and that the Board's remedial action prevented a finding of deliberate indifference. In disposing of plaintiff's claim that the Board's policies constituted punishment of pretrial detainees the Court found that the policies complained of served a legitimate penological goal and therefore that claim failed as well.

The matter was set for trial on August 19th, 1998, on the remaining issues. Just prior to trial, the Board tendered $100,000, the Missouri sovereign immunity cap, in settlement of the surviving negligence claim against it. As this amount represented the most that the plaintiff could hope to realize on trial of the matter, plaintiff accepted the offer in settlement of the negligence claim, with the express understanding that acceptance did not impair his rights under the 1983 claims.

At this point the plaintiff was faced with a very difficult case to present to the jury. The Trial Court had decided, as a matter of law, that the Board would not be liable under Section 1983 for it's role in the manufacture of the paddy wagons. This decision reduced their liability to the $100,000 and got them out of the lawsuit. The Court had previously decided that Knapheide was only a contract builder not subject to liability

under negligence or products liability theories. This left the plaintiff's case hanging from a factual thread. The plaintiff had to prove that Knapheide had made the decisions not to install seatbelts. This had to be proven in the face of the Court's judgment that the Board have made every other design decision. Two days into the trial process the Knapheide defendants offered a relatively small amount of money to settle the remaining claim against them. Due to the plaintiff's precarious position in the litigation at that point, he was forced to accept the offer. Knapheide insisted on a nondisclosure clause in the settlement, so counsel is not free to disclose the precise amount of the settlement. Without violating that agreement plaintiff is free to state that the amount realized from both settlements will only sustain him for a period of seven years, at which point he will be forced to return to the welfare nursing care homes in which he spent the first seven years immediately after his quadriplegic injury.

Plaintiff pursued his remedies in an appeal to The United States Court of Appeals for the Eighth Circuit. The Appellate Court Affirmed the District Court's grant of summary judgement, adding little more to the District Court's analysis than a statement that even if the risk of injury (from lack of seatbelts, padding etc.) was obvious, the plaintiff had still failed to prove that the paddy wagons posed a substantial risk of serious injury. The United States Court of Appeals issued it's opinion on July 26th, 1999. Plaintiff filed a timely Motion for Rehearing and a Motion for Rehearing In Banc which was denied on September 13th, 1999.

## REASONS FOR GRANTING THE WRIT

### I. WHAT IS THE STANDARD OF CULPABILITY FOR A MUNICIPAL POLICE DEPARTMENT THAT ENGAGES IN THE DESIGN AND MANUFACTURE OF MOTOR VEHICLES, FOR THE TRANSPORTATION OF ARRESTED PERSONS, WHEN THE VEHICLES DO NOT COMPLY WITH THE FEDERAL MOTOR VEHICLE SAFETY STANDARDS, OR PROVIDE ANY MEASURES FOR THE SAFETY OF PERSONS TRANSPORTED THEREIN, AND THE DEFECTIVE DESIGN CAUSES THE PLAINTIFF TO BE RENDERED QUADRIPLEGIC IMMEDIATELY AFTER HIS ARREST FOR SIMPLE ASSAULT DURING HIS TRANSPORTATION TO THE POLICE DEPARTMENT?

The United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit have applied improper standards for determining the Board's culpability in this case. The plaintiff alleged and produced evidence that the Board through it's direct action engaged in the design and manufacture of paddy wagons which did not meet the minimum standards of the Federal Motor Vehicle Safety Standards and compounded that danger by maintaining official policies of transporting handcuffed, intoxicated arrestees in the wagons. The Courts erroneously applied the standards of culpability reserved for Eighth

Amendment cases and compounded the error by undertaking an analysis only required in cases involving issues of respondeat superior liability.

These errors are the result of the current state of the law surrounding Section 1983 law. As Justice Breyer, joined by Justices Stevens and Ginsberg stated in *Board of County Commissioners of Bryan County Oklahoma v. Brown,* 520 U.S. 397 (1997) "*Monell's* prohibition against municipal liability based on respondeat superior has produced a highly complex body of interpretive law which is difficult to apply." *Brown* was a case which dealt with the outer edges of Section 1983 liability, as have many of the cases which this Court has reviewed over the last twenty years. The present case, *Spencer v. Knapheide Truck Equipment Co.,* 183 F.3d 902 (8th Cir. 1999), concerns issues at the heart of Section 1983. Acceptance of Certiorari will allow this Court to affirm the basic principles of *Monell* and to clarify the standards of culpability for municipalities.

Where *Brown* dealt with the complex issues of respondeat superior at the edge of Section 1983 liability, *Spencer v. Knapheide* is the simple case. *Brown* presented the issue of whether a municipality could be held liable under Section 1983 for a single, facially lawful act, of improperly screening a prospective employee, who later then used excessive force in arresting the plaintiff. The *Spencer* case involves direct action by a municipal police department that either violated the National Traffic and Motor Vehicle Safety Act or directed the Knapheide defendants to violate the act. Issues of causation are

simple. The lack of seatbelts or padding in conjunction with the Board's official policies of handcuffing and transporting intoxicated persons in the wagons are alleged to have directly caused the plaintiff's injury. This Court stated in *Board v. Brown* at 1388-1389:

> Where a plaintiff claims that a particular action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. Section 1983 itself contains no state of mind requirement independent of that necessary to state a violation of an underlying federal right. In any Section 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation. Accordingly, proof that a municipality's legislative body or authorized decision maker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably.Similarly, the conclusion that the action taken or directed by the municipality or it's authorized decisionmaker itself violates federal law will also determine that the municipality was the moving force behind the injury of which the plaintiff complains.

It is part of Spencer's complaint that he was denied the protections mandated by the Federal Motor Vehicle Safety Standards, that are enjoyed by everyone who has purchased a motor vehicle since 1973. Another part of his complaint is that the Board gave no consideration to the safety of the passengers that were to be carried in the paddy wagons, when it designed the wagons and had them manufactured. This Court has stated many times that we owe a duty to protect those persons we take

into custody. Surely a municipality is not free to design it's own vehicles and make no effort to ensure the safety of the vehicle's occupants.

This Court, in *Board of County Commissioners v. Brown*, clarified *City of Canton Ohio v. Harris*, 489 U.S. 378 (1989), by stating that the constitutional deprivation must be the plainly obvious consequence of the inadequate policy attacked. The *Brown* case was a negative example. The excessive force used by the deputy was not the plainly obvious consequence of the inadequate screening process, used in hiring the deputy. The *Spencer* case would be a useful example of what is the plainly obvious consequence of an inadequate municipal policy. Being thrown about in the back of a paddy wagon, and being injured, is the plainly obvious consequence of a municipal policy of building and using paddy wagons, devoid of safety belts, padding or other safety devices, to transport handcuffed and intoxicated individuals.

The United States District Court and the Eighth Circuit Court of Appeals both framed their analysis of this case in terms of the duties owed to pretrial detainees. Relying on this Court's statement in *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983), that pretrial detainees are entitled to at least as great protection as that afforded convicted prisoners, both the District Court and the Eighth Circuit Court of Appeals applied the *Farmer v. Brennan*, 511 U.S. 825 (1994) analysis to the facts of the *Spencer* case. In doing so they have overlooked this Court's distinction between liability based upon a prison official's intent to inflict cruel and unusual

punishment, and liability based upon a municipality's disregard of obvious needs as defined in *Canton v. Harris* . The District Court and the Eighth Circuit Court of Appeals have forced the plaintiff to attempt to establish the subjective state of mind of a municipal entity. As this Court suggested in *Farmer* at 841, the plaintiff has encountered considerable conceptual difficulty in doing so. Acceptance of the *Spencer* case will allow this Court to clarify the fact that not all persons in police custody are pretrial detainees with civil rights limited to the protections provided under the Eighth Amendment.

## II. WHERE A 1983 PLAINTIFF ALLEGES THAT HIS CONSTITUTIONAL INJURY OCCURRED AS THE RESULT OF A MUNICIPAL ENTITY'S DISREGARD OF OBVIOUS NEEDS OR RISKS, DOES HE HAVE TO DEMONSTRATE PRIOR SIMILAR INJURIES TO SHOW THAT THE ENTITY HAD NOTICE OF THE RISK OR NEED, AND IF SO WHAT CONSTITUTES NOTICE?

Much of the error in the *Spencer* case, by the District Court and the Eighth Circuit Court of Appeals, flows from the use of the Eighth Amendment standards. It seems conceptually clear that if a plaintiff complains that his constitutional injury flows from a municipality's disregard of obvious needs that he does not need to show a prior pattern of similar injuries to prove that the municipality had notice of the obvious. Here, however, both the District Court and the Eighth Circuit required Spencer to demonstrate a prior pattern of serious injuries in order to

show that the Board had notice of the need for safety belts or other measures for the safety of the citizens which it transported in the paddy wagons. Under such an analysis, the first constitutional violation caused by disregard of an obvious need would never be compensable, regardless of the obviousness of the risk or need, or the severity of the constitutional violation. Acceptance of this case for review would allow this Court to clarify this issue.

## III. WHAT STANDARD IS USED TO JUDGE MUNICIPAL LIABILITY WHERE THE MUNICIPALITY HAS IDENTIFIED OFFICIAL POLICY THAT POSES A RISK OF HARM AND HAS TAKEN INEFFECTIVE REMEDIAL ACTION SUCH THAT FURTHER HARM OCCURS?

This case presents for review the more serious, or more conceptually complex, issue of what effect a municipality's attempt at remedial effort has on it's liability under 1983. Here the Board promulgated some directives for officers to seat prisoners at the front of the wagons and to drive carefully. These instructions were promulgated by the Board after six injuries had occurred in the paddy wagons. Eight more injuries occurred and the Board did nothing further. The ninth injury was Spencer's quadriplegic injury. Both the District Court and the Eighth Circuit stated that this remedial effort prevented a finding of deliberate indifference. This Court has not directly addressed the standard by which remedial efforts should be

judged although it touched on the issue in *Farmer v. Brennan* when it stated:

> Prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the Section 1983 risk, even if the harm ultimately was not averted.

This standard would be viable for general application in all Section 1983 cases presenting unsuccessful remedial effort. Plaintiff suggests that the issue of the reasonableness of the response would generally be a question of fact for the jury.

## IV. IS THE IMPOSITION OF SUMMARY JUDGMENT, ON THE ISSUE OF A MUNICIPALITY'S DELIBERATE INDIFFERENCE, APPROPRIATE IN A SECTION 1983 ACTION WHERE THE PLAINTIFF WAS RENDERED QUADRIPLEGIC AS A RESULT OF BEING TRANSPORTED IN A PADDY WAGON WHICH POSED OBVIOUS RISKS TO OCCUPANTS BECAUSE IT LACKED SAFETY BELTS, PADDING OR ANY OTHER MEASURES TAKEN TO INSURE SAFETY?

The *Spencer* case raises a number of issues regarding the proper role of the judiciary and the jury in Section 1983 cases. Acceptance of the *Spencer* case will allow this Court to give guidance on the role of Rule 56 Summary Judgement in Section 1983 cases. This Court in *City of Canton v. Harris*, set out a standard of liability for municipal entities, under section 1983,

based on disregard of obvious risks or needs. The *Canton* case did not, however, address the issue of what constituted obviousness, or who is to make the decision of what constituted an obvious risk. Plaintiff suggests, that where the subject matter of the risk is one with which the general public is familiar, or that can be readily understood and where all other elements are met, the issue becomes one for the jury to decide. The *Spencer* case presents this Court with an opportunity to address that issue. Herein the District Court and the Eighth Circuit Court of Appeals treated the issue of obviousness as a question for the Court to decide and not one for the jury. The lower courts also treated the issues of reasonableness of the remedial effort and whether the Board had notice of a dangerous condition as a question for the court and not for the jury.

## CONCLUSION

The Court should grant certiorari to review this important matter and reverse the United States Court of Appeals for the Eighth Circuit. Doing so will give much needed guidance to all of the Circuits on several important issues that have not been addressed by this Court, concerning Section 1983 liability. The factual situation presented by this case is unique but it provides the opportunity for this Court to affirm the core of American civil rights and the principles of *Monell*.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

**United States Court of Appeals**
**FOR THE EIGHTH CIRCUIT**

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No. 98-3717

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Joseph L. Spencer,
Plaintiff-Appellant,
v.

Knapheide Truck Equipment Co.;
Defendant,

The Board of Police Commissioners
of the Kansas City, Missouri Police Department through its
members, Dr. Stacy Daniels,
in her official capacity as Vice President,
Board of Police Commissioners;
Jeffrey J. Simon, in his official capacity as Treasurer, Board
of Police Commissioners;
Joseph J. Mulvihill, in his official capacity
as a Member, Board of Police Commissioners; Emmanuel
Cleaver, in his official capacity as
ex officio member, Board of Police Commissioners and
Mayor, City of Kansas City, Missouri;
Defendants - Appellees,

Knapheide Manufacturing Company,
Defendant.

Knapheide Truck Equipment Co.,
Knapheide Manufacturing Company,
Third-Party Plaintiffs.

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Appeal from the United States District Court
for the Western District of Missouri

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Submitted: April 20, 1999.
Filed: July 26, 1999

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Before BEAM and HANSEN, Circuit Judges, and KOPF,[1] District Judge.

BEAM, Circuit Judge.

Joseph Spencer appeals from the district court's adverse grant of summary judgment in his section 1983 suit for personal injuries allegedly sustained as a result of his arrest and subsequent transportation to a police facility in a patrol wagon. For the reasons discussed below, we affirm.

## I. BACKGROUND

On January 30, 1992, while on patrol wagon duty, Officer Trussler of the Kansas City, Missouri, Police Department, responded to a call to transport Spencer to. the police station. Spencer had been arrested for simple assault. Upon arriving at the scene, Officer Trussler handcuffed an intoxicated Spencer with his hands behind his back and escorted him to the rear of a patrol wagon and into the prisoner compartment. Once inside the compartment, Spencer sat on one of two steel benches

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[1] The Honorable Richard G. Kopf, District Court Judge for the District of Nebraska, sitting by designation.

which run lengthwise along each side of the compartment's interior.[2] There were no seatbelts or other safety restraint devices installed in the compartment. Spencer claims that during the trip to the police station, he had difficulty maintaining his balance on the bench and that he was tossed around as Officer Trussler made turns, stops, and starts. At some point during the ride, Spencer claims he was thrown forward into the bulkhead of the compartment causing severe injuries and rendering him a quadriplegic.

Spencer filed an eleven-count complaint in federal district court raising various claims against members of the Board of Police Commissioners of Kansas City, Missouri (Board), in their official capacities, and Knapheide Truck Equipment Company and Knapheide Manufacturing Company (Knapheide), the manufacturer and seller of the patrol wagon. The claims against Knapheide were either dismissed or settled and are not the subject matter of this appeal. One of the claims asserted against the Board was also settled, and the Board moved for summary judgment on the remaining allegations.

The claims assert a section 1983 cause of action for alleged violations of Spencer's Fifth and Fourteenth Amendment rights. Specifically, Spencer asserts that: (1) the Board maintained an official policy of purchasing and using patrol wagons that were inherently unsafe; (2) the Board had a policy of transporting intoxicated individuals with their hands handcuffed behind their back in these patrol wagons, even after it had notice that such policy was resulting in injuries; and (3) these policies constituted a form of punishment for pretrial detainees. The

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[2] Officer Trussler contends that he twice instructed Spencer to sit on the floor of the police wagon, but that plaintiff did not comply. Spencer, however, claims that he was never told to sit on the floor.

district court granted summary judgment in favor of the Board. We affirm.

## II. DISCUSSION

We review a grant of summary judgment de novo. *See Liebe v. Norton*, 157 F.3d 574, 578 (8th Cir. 1998). Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See Smith v. Watkins*, 159 F.3d 1137, 1138 (8th Cir. 1998). Our analysis begins with the recognition that because Spencer's section 1983 suit is against the members of the Board in their official capacities, it must be treated as a suit against the municipality. *See Liebe*, 157 F.3d at 578. A plaintiff may establish municipal liability under section 1983 by proving that his or her constitutional rights were violated by an "'action pursuant to official municipal policy' or misconduct so pervasive among non-policymaking employees of the municipality 'as to constitute a "custom or usage" with the force of law.'" *Ware v. Jackson County*, 150 F.3d 873, 880 (8th Cir. 1998) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)).

The district court stated that for liability to attach, Spencer must also establish that the Board was "deliberately indifferent" to or tacitly authorized such misconduct after notice of the misconduct. The court then went on to find that: (1) Spencer failed to establish evidence of a pattern of constitutional violations and (2) even if he had, he failed to demonstrate that the Board was deliberately indifferent to the safety of the individuals transported in the patrol wagons. The district court's application of the "deliberate indifference" standard forms the gravamen of Spencer's argument on appeal Specifically, Spencer claims that the district court erred in analyzing his claims under an Eighth Amendment subjective deliberate

indifference standard instead of an objective deliberate indifference test.

"'[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.'" *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1719 (1998) (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)). Thus, a prisoner's Eighth Amendment rights are violated when government entities or officials are deliberately indifferent to a prisoner's medical needs, *see Estelle v. Gamble*, 429 U.S. 97, 104 (1976), or to his or her safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). In this case, however, because Spencer was a pretrial detainee[3] his claims are properly analyzed under the due process clause of the Fourteenth Amendment rather than the Eighth Amendment. *See Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993). The question before us then is whether we analyze the government's actions or inactions in such cases under the Eighth Amendment "deliberate indifference" standard or some other, less stringent, exercise.

Spencer concedes that deliberate indifference is the correct standard to apply in this case. However, he contends that the term has different meanings depending on the context in which it is being used. He argues that the district court erred in applying the *subjective* "deliberate indifference" standard used in Eighth Amendment cases in this pretrial detainee case alleging due process violations. That standard requires a plaintiff alleging deliberate indifference to prove that the

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[3] Although Spencer states at one point in his brief that his status at the time in question is more accurately characterized as that of an arrestee rather than a pretrial detainee, both his complaint and the district court's order frame the discussion in terms of the rights of pretrial detainees. As it does not impact our analysis of his claim, we do the same.

official both knew of and disregarded an excessive risk to health or safety. *See Farmer*, 511 U.S. at 837. Instead, Spencer argues, the district court should have analyzed his claims under an *objective* deliberate indifference standard. Under such a standard, a municipality is liable for maintaining a policy in which an inadequacy is "so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989); *see also Farmer*, 511 U.S. at 840-41.

The standard to be applied in assessing a pretrial detainee's claim of due process violations, such as this one, is not entirely clear. The Supreme Court has held that pretrial detainees are entitled under the Fourteenth Amendment to "at least as great" protection as that afforded convicted prisoners under the Eighth Amendment. *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983). This court has yet to settle on a clearly binding standard. *See Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994). Although we have suggested, in dicta, in cases dealing with pretrial detainees' claims of inadequate medical care, that a more stringent standard than deliberate indifference would be appropriate, no specific standard has yet been established. *See Johnson-El v. Schoemehl*, 878 F.2d 1043, 1055 n.8 (8th Cir. 1989); *Davis*, 992 F.2d at 152.

However, we do not think that the facts of this case call for a determination of this issue, for even if we were to apply an objective deliberate indifference standard, we would still find that Spencer has failed to state a due process violation. As the district court correctly noted, deliberate indifference is a difficult standard to meet. *See Liebe*, 157 F.3d at 577. Regardless of whether the term is framed as a subjective or objective test, the alleged deprivation must still be "sufficiently

serious" and "pose a substantial risk of serious harm." *Farmer*, 511 U.S. at 834; *see also Liebe*, 157 F.3d at 577.

Thus, even using an objective standard, we do not think that the Board's purchase of patrol wagons without safety restraints nor its manner of transporting individuals in these wagons were policies that obviously presented a "substantial risk of serious harm." This is particularly true in light of the fact that, at the time of. Spencer's arrest, the Kansas City, Missouri, Police Department had guidelines in place which instructed its officers to exercise caution when transporting individuals in the patrol wagon.[4] Though these guidelines may not have been adequate to prevent injuries, their failures, if any, constitute negligence at most.

Spencer claims that the Board's deliberate indifference is also illustrated by the fact that prior to his arrest, the Board had notice, in the form of citizen complaints filed with the Board's Office of Citizen Complaints, that injuries were occurring to individuals during transport in the patrol wagons. The record shows that, with the exception of one detainee who was taken to the hospital, the complaints refer to minor injuries or allegations of being tossed about the compartment without any

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[4] The instructions state in pertinent part that: Officers operating the patrol wagon/van will:

. . .

(3) Advise prisoners to use caution when entering the wagon.

(4) Advise prisoners to sit at the front of the wagon or on the floor.

(5) Place on the floor of the wagon any prisoner whose physical condition would not permit them to protect themselves from falling or being thrown against the sides of the wagon.

(6 Drive in such a manner as to not injure prisoners.

Kansas City, Missouri Police Department Procedural Instruction, Annex E-Handcuffing and Transportation of Prisoners (1991).

resulting injuries. In short, we find that the complaints do not establish that the Board was deliberately indifferent to conditions that posed a substantial risk of serious harm..

Finally, we reject Spencer's claim that the Board's policies constituted a form of punishment for pretrial detainees. When a policy lacks an express intent to punish, as this one does, we may infer such an intent if the policy is either unrelated to a legitimate penological goal or excessive in relation to that goal. *See Haslar v. Megerman*, 104 F.3d 178, 180 (8th Cir. 1997). The Board's decision to use patrol wagons without seatbelts was based on its concern that individuals transported in the wagon, even those who were handcuffed, could use the seatbelt as a weapon to harm an officer, other passengers being transported in the wagon, or even themselves. Such a policy is related to the legitimate penological goal of transporting individuals to police facilities without harm to officers or passengers. Nor can we infer an intent to punish from the Board's decision not to install any other forms of safety devices or padding in the wagon, especially in light of the Board's guidelines cautioning officers to exercise care in the transport of such individuals and the paucity of complaints of serious harm occurring during such transport.

Although we sympathize with Mr. Spencer's condition and regret the unfortunate circumstances which led to his injury, we do not think that these facts rise to the level of a constitutional deprivation.

## III. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

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No. 95-0160-CV-W-6
06-25-97A09:19 RCVD

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JOSEPH L. SPENCER,

Plaintiff,

Vs.

KNAPHEIDE TRUCK EQUIPMENT CO., et al.,
Defendants.

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FILED JUN 24 1997

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**JUDGMENT IN A CIVIL CASE**

DECISION BY COURT. This action came to consideration before the Court. The issues have been determined and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED**

The board of Police Commissioners' Motion for Partial Summary Judgement is GRANTED on Counts VI and VII. Judgement is entered in favor of the Board on Counts VI and VII of plaintiff's complaint.

Knapheide Truck Equipment and Knapheide Manufacturing's Motion for Summary Judgment is GRANTED in part and DENIED in part. Summary judgement is granted on Counts II, III, IX and X as to both defendants. Judgement is entered in

favor of defendants Knapheide Truck Equipment and Knapheide Manufacturing.

Date JUN 24 1997 R.F. CONNOR, CLERK

/s/ R. Riley

Entered In JUN 24 1997 R. Riley, Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF MISSOURI**
**WESTERN DIVISION**

No. 95-0160-CV-W-6
06-25-97A09:19 RCVD

JOSEPH L. SPENCER,

Plaintiff,

Vs.

KNAPHEIDE TRUCK EQUIPMENT CO., et al.,
Defendants.

FILED JUN 17 1997

***MEMORANDUM AND ORDER***

Plaintiff Spencer has alleged various claims arising from injuries purportedly incurred when he was being transported in a Kansas City, Missouri, Police Department vehicle operated by third-party defendant Trusler. Currently before the court are the Motion for Partial Summary Judgment filed by defendants Headley, Boley, Cleaver, Ralls and Daniels, in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri (the Board), and defendants' Knapheide Truck Equipment Company and Knapheide Manufacturing Company (Knapheide defendants) Motion for Summary Judgement.[1] The Board seeks summary judgment on Counts VI and VII of plaintiff's Complaint, which allege that

[1] Third-party Trusler's Motion for Summary Judgement has been denied. The claim is, however, a contingent one rather than a direct claim by Spencer.

the Board was deliberately indifferent in purchasing and using inherently unsafe patrol wagons in violation of 42 U.S.C. § 1983. It does not seek summary judgment on Count V, alleging dangerous condition of property. The Knapheide defendants seek summary judgment on all claims against them (Counts I-Iv and VIII-XI, inclusive). These include plaintiff's allegations that the Knapheide defendants are strictly liable for his injuries because the patrol wagon body was not equipped with seat belts, that the Knapheide defendants negligently designed and manufactured the patrol wagon body, that they negligently failed to recall or retrofit the patrol wagon body with seat belts, and that the Knapheide defendants should be liable for punitive damages for selling the patrol wagon body without seat belts.

**Undisputed Factual Background**

Plaintiff claims that he was injured on January 30, 1992, while being transported in a Kansas City, Missouri, Police Department wagon. The patrol wagon was operated by third-party defendant Trusler, who was at that time a police officer for the Kansas City, Missouri, Police Department.

On January 30, 1992, Officer Trusler was assigned to patrol wagon duty. Responding to a call to transport a prisoner arrested by another officer, he drove his patrol wagon to the location where plaintiff, the prisoner, had been arrested. Officer Trusler handcuffed plaintiff with his hands behind his back and escorted him to the rear of the patrol wagon. Plaintiff sat on one of the benches which ran along the sides of the wagon's interior[2] There were no seat belts installed in these benches.

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[2] Officer Trusler contends that he twice instructed plaintiff to sit on the floor of the police wagon, but that plaintiff did not comply. Plaintiff, however, asserts that he was never instructed to sit on the floor. For purposes of this motion this factual dispute is immaterial.

At one point during the drive to the police station, Officer Trusler, while stopped at a red light, observed plaintiff attempt to stand and to then fall. Officer Trusler continued driving until he reached the station, where he stopped the vehicle. When he opened the wagon's door to escort plaintiff out of the vehicle, plaintiff stated that he was too drunk to move and requested assistance exiting the wagon and entering the station. Even with Officer Trusler's assistance, however, plaintiff was unable to stand or walk. Officer Trusler then, in accordance with police procedure regarding arrestees too intoxicated to stand or walk on their own, brought plaintiff to Truman Medical Center, where it was determined that plaintiff's physical condition was much worse than supposed. Plaintiff has been substantially limited in his motion since this time; he has been rendered a quadriplegic and is confined to a wheelchair.

Prior to January 30, 1992, the police department had used the same type of patrol wages - a Knapheide utility body mounted on a truck chassis - for approximately ten years. In the 1970s, the Board purchased a number of patrol wagons from another company; the design specifications for the patrol wagon bodies were contained on each of the purchase orders. In 1979, the Board solicited bids for the purchase of seven patrol wagon bodies with design specifications identical or substantially similar to those previously purchased, and Knapheide Truck[3] was awarded the contract. From that time through 1992, Knapheide Manufacturing manufactured the truck utility bodies and Knapheide Truck, a distributor for several manufacturers of truck bodies and equipment, sold the truck utility bodies to the department.

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[3] At that time Knapheide Truck Equipment Company was doing business as Adolph-Knapheide Truck Equipment Company.

**Standard for Summary Judgement**

Summary judgement will be granted when there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Mudlitz v. Mutual Service Ins. Companies,* 75 F.3d 391, 393 (8th Cir. 1996). A disputed fact is not material unless it may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). The material facts, and the reasonable inferences therefrom, must be viewed in the light most favorable to the nonmoving party. *Id.* at 248, *Utility Elec. Supply v. ABB Power T & D Co.* 36 F.3d 737, 739 (8th Cir. 1994).

**Board of Police Commissioners**

Counts VI and VII of plaintiff's Complaint allege that the Board violated 42 U.S.C. § 1983 by maintaining an official policy of purchasing and using inherently unsafe patrol wagons. Count VI alleges that the Board was deliberately indifferent to injury caused by their policy of transporting handcuffed prisoners in the patrol wagons. Count VII alleges that the Board's policies constituted punishment of pretrial detainees and that the Board was deliberately indifferent to this punishment.

A § 1983 claim against governmental officials acting in their official capacity must allege that the defendants deprived plaintiff of a constitutional right and that the deprivation of that right resulted from the execution of official policy or custom. *Monnell v. Department of Social Services*, 436 U.S. 658, 694 (1997). To prove such a custom, plaintiff must show the existence of a continuing pattern of unconstitutional misconduct so persistent and widespread as to have the force and effect of law. *Andrews v. Fowler*, 98 F.3d 1069, 1074 (8th Cir. 1996) (citations omitted). Plaintiff must also demonstrate

deliberate indifference[4] to or tacit authorization of such conduct by the Board after notice of the misconduct. *Jane Doe "A" v. Special School District*, 901 F.2d 642 646 (8th Cir. 1990). "A showing of . . . even heightened negligence will not suffice." *Board of County Commissions of Bryan County v. Brown*, 117 S.Ct. 1382, 1390 (1997). Additionally, because plaintiff was a pretrial detainee, not a convicted prisoner, his claim is governed by the due process clause of the Fourteenth and Fifth Amendments. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048 (8th Cir. 1989). Unlike convicted prisoners, the state has no right to punish pretrial detainees. *Id.* The Board will therefore be liable for plaintiff's injuries if its policy of transporting detainees in wagons unequipped with seat belts constitutes either deliberate indifference to the detainees' well-being or punishment. *Haslar v. Megerman*, 104 F.3d 178, 1979 (8th Cir. 1997).

Deliberate indifference is a difficult burden for a plaintiff to meet. *Rellergert v. Cape Girardeau County, Missouri*, 924 F.2d 794, 796, (8th Cir. 1991). Indifference is apathy or lack of concern. *Id.* at 797. In the context of a municipality's alleged failure to train or to prevent misconduct by its employees, courts have stated that to show deliberate indifference, a plaintiff must demonstrate that municipal officials failed to take remedial steps following notice of a pattern of constitutional violations, *Harris v. City of Pagedale*,

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[4] The Supreme Court and the Eighth Circuit have left open the question of whether the Fourteenth Amendment provides pretrial detainees with a greater degree of protection than the Eighth Amendment provides convicted prisoners. *See, e.g. City of Canton, Ohio v. Harris*, 439 U.S. 378, 389 n. 8 (1989); *Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994). In the absence of a clearly established standard, the Eighth Circuit has applied the deliberate indifference standard. *See Whitnack*, 16 F.3d at 957; *Johnson-El*, 878 F.2d at 1055 n. 8. Thus, the court will apply the deliberate indifference standard.

821 F.2d 499, 504 (8th Cir. 1987), quoting *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986). Notice of the unconstitutional behavior need not be shown where the inadequacy is so likely to result in a deprivation of constitutional rights that the policymakers can be said to have been indifferent to the need. *City of Canton*, 489 U.S. at 390; *Larson v. Miller*, 76 F.3d 1446, 1454 (8th Cir. 1996).

The Board argues that summary judgment should be granted in its favor because there is no evidence of a pattern of constitutional violations. Defendants contend that, despite long-term use of the same variety of patrol wagon, the Board and the Chief of Police had no knowledge of any prior serious injuries incurred as a result of patrol wagon conditions. The Board further alleges that it established an Office of Citizens Complaints as a means of obtaining such knowledge, but that there were no complaints of serious injuries to persons transported in patrol wagons.

Plaintiff challenges a number of the Board's factual assertions. He presents evidence that the Director of the Board's Office of Citizen Complaints was aware of citizens' complaints of being injured in the back of patrol wagons and that the Office of Citizens Complaints received at least fourteen complaints of such injuries between 1980 and 1992. These complaints were received and reviewed by the Office of Chief of Police.[5] Plaintiff also presents the deposition testimony of police officers who had been told of citizens' claims of injury while in a patrol wagon. In particular, he has submitted testimony of Officer Trusler indicating that, prior to plaintiff's injury, an intoxicated detainee had sustained injury when he fell in a patrol wagon driven by Officer Trusler.

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[5] In the absence of joinder of a Chief of Police as defendant or proof of knowledge of the members of the Board, plaintiff may also have a problem with the rule against recovery on a respondeat superior theory.

Giving plaintiff the benefit of all reasonable inferences, the evidence fails to establish a pattern of unconstitutional behavior. In order to rise to the level of a constitutional violation, the transportation of prisoners in the patrol wagons must have posed a substantial risk of serious harm. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Bell v. Stigers*, 937 F.2d 1340, 1343 (8th Cir. 1991) (Violation of substantive rights necessitates deliberate indifference to "a strong likelihood, rather than a mere possibility" of resulting harm). With the exception of one detainee who reported being hospitalized as a result of his ride in a patrol wagon, that citizens' complaints plaintiff presents indicate only that a relatively small number of detainees were tossed around and that a relatively small number of detainees were tossed around and received bruises during their rides in police patrol wagons. The incidents described in citizens' complaints are thus not sufficiently serious to constitute a pattern of prior constitutional violations.[6]

Even if plaintiff's evidence established a pattern of unconstitutional behavior, plaintiff has failed to demonstrate that the Board was deliberately indifferent to prisoners' safety. The Board directed police officers to be aware that the physical condition of many prisoners would render them unable to maintain their balance in a moving patrol wagon and, beginning in 1991, directed officers to sit prisoners accordingly. Rather than demonstrating apathy or unconcern, these policies represent affirmative steps to prevent injury in the patrol wagons. While the precautions taken by the Board may have failed and while this failure might constitute negligence, the evidence does not support the conclusion that the policy of

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[6] I do not understand that plaintiff seeks recovery under the "state-created danger" theory. In any event, the record does not show a submissible case of "grossly reckless acts" or "willful disregard" for plaintiff's safety, as would be required under that line of cases. *See, e.g., Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3rd Cir. 1996).

transporting handcuffed prisoners in patrol wagons was deliberately indifferent to prisoners' physical well-being. Thus, the court will grant summary judgment on Count VI of plaintiff's Complaint.

The Board may also be liable for plaintiff's injuries if the transportation of prisoners in ill-equipped patrol wagons constitutes punishment. When a policy lacks an express intent to punish, as this one does, the court may infer such an intent if the policy is either unrelated to a legitimate penological goal or excessive in relation to that goal. *Haslar*, 104 F.3d at 180. Handcuffing detainees and placing them in patrol wagons clearly serves the legitimate penological goal of transporting prisoners to police facilities without danger to the officers driving the wagons. The Board argues that there is also a legitimate reason for failing to install seat belts in the wagons: That they can be used as weapons against officers.

Plaintiff questions the legitimacy of this contention. Plaintiff presents testimony of Kansas City police officers, including the former Police Chief, indicating that they were not aware of any incidents in which a seat belt was used as a weapon and that, when the topic was discussed, no officer could give an example of such an occurrence. On the other hand, plaintiff offers no proof that seat belts in vehicles of this nature were standard equipment when the patrol wagon was purchased.[7]

Even if the Board's proffered reason for failing to install seat belts is of debatable legitimacy, there is no evidence from which a reasonable jury could infer an intent to punish. The

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[7] The court is aware of somewhat dated and inconsistent rulings in Chicago on the issue presented, but there is considerably less litigation than might be expected if there were constitutional fault on a nationwide scale. Compare, for example, the significant number of jail-suicide cases.

seating policy adopted in 1991, standing alone, precludes such an inference.

I further observe that the likely reason for exempting buses from the seat-belt requirement somewhat supports defendants here. It is suggested that, by reason of size and weight, there is not likely to be very serious injury in a collision of a bus with another vehicle. In the present case, since there was no collision, the danger is comparable to that in a bus. The Police Board might well assume that police officers transporting one or more prisoners without seat belts would drive with considerable care, as when groceries or an unguarded baby are being transported. Heavy jostling and even falls may be anticipated from sudden stops or swerves, particularly in the unexpected situation of a standing passenger, but not the sort of injury that would occur in a two-car collision where passengers are not wearing seat belts.

The distinction between ordinary or even gross negligence and the constitutional tort of deliberate indifference is a difficult line to draw, and is one where judges, by reason of wide experience with litigation may properly be more intrusive than in the ordinary case, where judges and jurors are equally experience.[8] Judges must second-guess punitive damages, and I believe they should not close their eyes to the difference in standards between negligence and the elusive higher degree of fault that will justify classifying tortious conduct as a violation of the Constitution.

In this case, where there is no showing, by case law or otherwise, that serious injury (as distinguished from bouncing and bruising) occurs with some frequency in patrol wagons

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[8] The jury in *Board of Commissioners of Bryan County v. Brown*, 117 S.Ct. 1332, 1392 (1997), found deliberate indifference, but the Supreme Court ruled otherwise as a matter of law.

where prisoners are handcuffed without seat belts, I do not believe the Police Board's conduct can fairly be classified as deliberately indifferent to a strong likelihood of serious injury to prisoners--particularly after injury-saving instructions have been issued to prospective drivers.

**The Knapheide Defendants**

***Negligence and Strict Liability Claims***

Counts I and VIII of plaintiff's Complaint allege that the Knapheide defendants are strictly liable for failing to equip the patrol wagon body with seat belts in violation of the National Traffic and Motor Vehicle Safety Act ("the Act"), 49 U.S.C. § 30101, et seq., and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208. Counts II and IX allege that defendants negligently designed and manufactured the patrol wagon body by failing to install seat belts as required by the Act and underlying safety standard 49 C.F.R. § 571.208.

The purpose of the Act is to "reduce traffic accidents and deaths and injuries resulting from traffic accidents," 49 U.S.C. § 30101, by enabling the Secretary of Transportation to promulgate uniform national motor vehicle safety standards. Under safety Standard 208, all vehicles manufactured between 1972 and before September 1, 1991, which were designed to transport more than ten passengers are considered buses and are not required by law to have restraints or seat belts installed, except in the driver's designated seating position.[9] *See* 49 C.F.R. § 571.3; 49 C.F.R. § 571.208.S4.4.1-2. The Knapheide defendants contend that the patrol wagon in which plaintiff was transported was designed to transport more than ten passengers; plaintiff challenges this contention.

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[9] It is undisputed that three sets of seat belts were installed in the drivers' compartment of the truck chassis of the patrol wagon.

The undisputed facts establish that the patrol wagon is capable of transporting more than ten people. Defendants' evidence indicates that up to twelve people have been transported in patrol wagons of the type in which plaintiff was allegedly injured. The issue turns on the requirement that the vehicle be "designed" to carry more than ten people. This could easily mean expected *standard* usage, not maximum capacity, as in elevators. the Knapheide defendants have failed to present admissible evidence regarding the designers' intent, but have merely presented testimony of persons without personal knowledge of the design process. They point out that the benches in the patrol wagon bodies were each 95 inches long. Because safety regulations require a bench seat over 50 inches to have at least three designated seating positions, 49 C.F.R. § 571.3, defendants infer that each bench in the wagon must have had, due to its length, at least five seating positions, for a total of ten, exclusive of the driver. There is no requirement, though, that a bench seat of 95 inches must have five seating positions.

Plaintiff points out that when the police department later installed seat belts in the patrol wagons, in May 1992, three sets of seat belts were installed on each bench. Plaintiff contends this action demonstrates that, for the purpose of transporting prisoners, the prudent design for capacity was six seating positions - three on each side - in the body of the wagon.[10] Thus, including three seat positions in the cab, the total seating

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[10] Defendants argue that this subsequent remedial measure, taken after plaintiff's injury, is not competent evidence to create a genuine issue of material fact as to negligence or defective design. Apart from the familiar evidentiary debate on this issue, that is not plaintiff's purpose in presenting the evidence, however. Plaintiff is presenting the evidence to demonstrate the standard number of seating positions in the wagon. It also apparently relates to the feasibility of using seat belts with potentially hostile detainees.

positions for the wagons is now only nine. Plaintiff contends that the patrol wagon should therefore be classified as a multi-purpose vehicle under the Act and thus required to have seat belts in the passenger compartment. Given the evidence, it appears that plaintiff should prevail on the present evidence, or at least that he has raised a genuine factual issue that would determine the patrol wagon's classification under the Act.

If, contrary to the above, the patrol wagons are classified as buses under the Act, the Knapheide defendants claim that plaintiff's strict liability and negligence claims under Missouri law are either expressly or impliedly preempted by the Act. It is well-established that state law which conflicts with federal law is without effect. *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992). Preemption may be stated expressly by Congress. Preemption may be implied where a federal regulatory scheme is sufficiently pervasive to indicate that Congress intended federal law to exclusively occupy a field or where state law actually conflicts with federal law. *Freightliner Corp. v. Myrick*, ___ U.S. ___, 115 S. Ct. 1483, 1487 (1995). Such conflict occurs where it is "impossible for a private party to comply with both state and federal requirements" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citations omitted).

The Act includes an express preemption clause which provides:

> When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is *identical* to the standard prescribed under this chapter (emphasis added).

49 U.S.C. § 30103(b)(1). The Act further contains a savings clause which provides:

> Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

49 U.S.C. §30103(3). Plaintiff argues that the savings clause preserves his claims.

No federal court has addressed the particular issue in this case.[11] A number of courts have, however, considered the question of whether the Safety Act and its regulations preempt a state tort action based on a manufacturer's failure to install and airbag system in its cars.[12] The overwhelming majority of federal cases hold that the Safety Act preempts common law airbag claims. *See, e.g., Harris v. Ford Motor Co.*, 1997 WL 160637 (9th Cir. (Cal.)); *Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S.Ct. 61 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989). *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). *cert. denied*, 494 U.S. 1065 (1990). These cases stand for the proposition that tort claims based on the failure to install a certain safety device not required by the Safety Act are preempted by federal regulation. *Compare Cartensen v.*

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[11] One court has determined that the Safety Act does not expressly preempt claims based on failure to install seat belts in a school bus; however, the court did not address whether the Act impliedly preempts such claims. *See Attocknie v. Carpenter Mfg., Inc.* 901 P.2d 221 (Okl. App. 1995).

[12] For cars manufactured after September 1, 1989, Standard 208, 49 C.F.R. § 571.208, gives automobile manufacturers the option of installing either an airbag or an automatic seat belt.

*Brunswick Corp.*, 49 F.3d 430 (8th Cir.), *cert. denied*, 116 S.Ct. 1982 (1995). In *Cartensen*, the court held that the Federal Boat Safety Act of 1971, which contains preemption and savings clause language similar to that contained in the Traffic and Motor Vehicle Act, preempted plaintiff's tort claim that boat manufacturers were negligent for failing to equip the boat with a propeller guard.

This court is persuaded that *Cartensen* applies to this case and dictates a finding that, if the patrol wagons at issue are classified as buses, the Safety Act preempts plaintiff's claims.[13]

Plaintiff argues that Congress could not have intended that a vehicle such as the Knapheide patrol wagon, without padding, handholds or restraints, be termed a bus under its regulations. Given that plaintiff has only challenged the lack of seat belts and that the federal regulatory scheme squarely addresses seat belt requirements, plaintiff's claims are preempted, according to *Cartensen* and the authorities relied on.[14] Whether or not the patrol wagons qualify as buses is thus the critical issue upon which the court's finding on preemption rests. For reason stated, I cannot grant summary judgment to defendants on this issue, and turn to their substantive defenses to tort liability.

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[13] In some of the above cases, the court concluded that the Safety Act expressly preempted the plaintiff's claim, *Harris*, 1997 WL 160637 at *5; *see also Cartensen*, 49 F.3d at 432; in others, the court concluded that the Act impliedly preempted plaintiff's claim. *Wood*, 865 F.3d at 403-7. The stated reasons for finding preemption, though, are the same in both instances.

[14] If free to do so, however, I might be persuaded that the presumption language bars nonidentical statutes and regulations by a state but that state common law is unaffected by the minimum standards established by federal law. *See Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995).

The Knapheide defendants argue that they are entitled to summary judgment on plaintiff's negligence and strict liability claims under the owner acceptance and contract specifications doctrines. Plaintiff asserts that defendants have waived these defenses because they did not plead either in their Answer and have not requested leave to amend their answer to include these defenses. Generally a party must set forth all affirmative defenses in the pleadings. *See* Fed. R. Civ. P. 8(c), 12(b).[15] The purpose behind this rule is to provide a plaintiff with notice, well before trial, that a defendant intends to present a particular defense. *Williams v. Ashland Engineering Co., Inc.*, 45 F.3d 588, 593 (1st Cir. 1995). A number of circuits, including the Eighth Circuit, have, however, allowed assertion of affirmative defenses for the first time in summary judgment motions when there is no prejudice to the plaintiff. *See, e.g., Financial Timing Publications, Inc. v. Compugraphic Corp.*, 893 F.2d 936, 944 n. 9 (8th Cir. 1990). Here, plaintiff does not indicate how he was prejudiced by defendants' untimely assertion of these defenses. This matter has not yet been set for trial. Moreover, plaintiff was afforded sufficient notice to prepare responses to defendants' summary judgment motion.

Consideration of the substance of these issues indicates that the Knapheide defendants are entitled to summary judgment on plaintiff's negligence claims based upon the acceptance doctrine. The acceptance doctrine relieves contractors of liability towards third parties who are not a party to the

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[15] Defendants assert that this is not an avoidance or other affirmative defense because it is a denial of plaintiff's allegations that defendants were responsible for creating the allegedly defective wagon design. While the defense, in part, merely negates plaintiff's allegations, the contact specifications and acceptance doctrines admit plaintiff's right to sue for negligent design and manufacture and then rely on the defendant Board's acceptance of the wagons and its role in designing them. Thus, the nature of defendants' claim is that of an affirmative defense.

contract, for injuries allegedly sustained as a result of the contractor's negligence, once the owner has accepted the contractor's work. *Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1340 (8th Cir. 1988); *Irwin v. Hoover Treated Wood Products, Inc.*, 906 F. Supp. 530, 535 (E.D. Mo. 1995); *Gast v. Shell Oil Co.*, 819 S.W.2d 367, 370 (Mo. banc 1991), quoting *Honey v. Barnes Hosp.*, 708 S.W.2d 686, 700 (Mo. App. 1986). Thus, the burden of proof is upon plaintiff to establish that the Knapheide defendants were in control of the patrol wagon at the time of his alleged injury. *See Coleman v. Kansas City, Missouri*, 859 S.W.2d 141, 146 (Mo. App. 1993). Plaintiff does not dispute that the wagons were accepted by the police department. Additionally, it is clear from the facts that the police department had accepted the work *See Id.* (stating that the acceptance necessary to relieve a contractor of liability to third parities is practical acceptance after contractor's completion of work and formal acceptance is not essential).

Plaintiff argues that summary judgment is inappropriate because there is a genuine issue of fact regarding Knapheide Truck's role in designing the patrol wagons. While a factual dispute does exist, it does not preclude summary judgment on the negligence claims. The factual dispute goes to the applicability of the contract specifications doctrine. This doctrine applies only if this case falls within the imminently dangerous exception to the accepted work doctrine. This exception imposes liability on the contractor even after acceptance where the defect is imminently dangerous to others, the defect is so hidden that reasonably careful inspection would not reveal it, and the contractor knows of the defect but the owner does not. *Rogers v. Frank C. Mitchell Co.*, 908 S.W.2d 387, 388 (Mo. App. 1995), citing *Gast*, 819 S.W.2d at 370. this imminently dangerous exception does not apply where a contractor has performed the work in accordance with the owner's specifications, the owner has accepted the work, and

there is no evidence that the owner relied on the contractor's expertise in designing the work performed. *Id.* at 398; *Gast*, 819 S.W.2d at 370-1. Because plaintiff has not argued that the exception to the accepted work doctrine applies, the question of whether the Knapheide defendants participated in the patrol wagon's design is not relevant to the court's determination on plaintiff's negligence claims.

This issue does, however, impact defendants' right to summary judgment on plaintiff's strict liability claims. A contractor's compliance with its customer's specifications is, with some exceptions, a complete defense to strict liability claims based on defective design. *Bloemer v. Art Welding Co., Inc.*, 884 S.W.2d 55, 56 (Mo. App. 1994). Absent a glaring deficiency in the specifications provided, a contractor has no duty to evaluate the safety of customer-provided designs. *Id.* at 60.

As stated above, there is dispute over Knapheide Trucking's role in the design process. Plaintiff presents some evidence that Knapheide Trucking participated in designing the wagons. For example, police Captain McAtee, at that time assigned to the vehicle maintenance unit, has testified that Knapheide Truck's sales representative at the time, Phil Carrott, provided him with blueprints of wagons then in use by another agency to determine if that type of wagon would fit the department's needs and that Mr. Carrott was responsible for drawing up specifications, based on the blueprints, for wagons to be built for the police department. Mr. McAtee further testified that, in trying to replace the wagons then in use by the department, the department was relying on the manufacturers to devise or help the department to devise the dimensions of the vehicles. Furthermore, plaintiff presents evidence that the department informed Knapheide Trucking, through Mr. Carrott, that it preferred not to install seat belts in the wagons, but that if federal or state regulation required installation the department

would certainly want to comply. There is also evidence that the engineering department of Knapheide Manufacturing was responsible for ensuring that equipment manufactured by Knapheide Manufacturing complied with federal safety standards. Thus, the police department appears to have relied on the Knapheide defendants to determine the applicability of any seat belt requirements. There is, therefore, a genuine issue of material fact precluding summary judgment on Counts I and VIII of plaintiff's Complaint.

The Knapheide defendants also assert that they are entitled to summary judgement because there is no proof of causation with respect to plaintiff's claims of injury and damages. Under Missouri law, unless plaintiff's injury had a sudden onset or unless there is other evidence that would allow jurors to draw the conclusion that the injury arose from hitting his head on the front wall of the wagon body without resorting to pure speculation, medical evidence is required. *Johnston v. Allis-Chalmers Corp.*, 736 S.W.2d 544, 548 (Mo. App. 1987). Defendants contend that the sudden onset doctrine is inapplicable and that plaintiff has failed to present competent medical testimony demonstrating causation.

The Missouri Court of Appeals for the Eastern District has held that "the sudden onset doctrine is unavailable when a pre-existing condition or intervening factor exists." *Rech v. AAA Plumbing*, 798 S.W.2d 194, 196 (Mo. app. 1990). The Knapheide defendants assert that the sudden onset doctrine is not applicable here because plaintiff had a pre-existing condition - severe degenerative changes in his cervical spine with spinal stenosis and osteophytes - and because there are other possible causes of plaintiff's injury.

The court first addresses the issue of plaintiff's pre-existing condition. In *Rech*, upon which defendants rely, plaintiff had re-injured his knee following a long history of arthritis of the

knees, knee surgery and contemplation of knee replacement surgery. Thus, the pre-existing condition was very similar to the one for which he was claiming damages. Conversely, in *Berten v. Pierce*, 818 S.W.2d 685, 687 (Mo. App. 1991), the Missouri Court of Appeals for the Western District decided that the *Rech* court "goes too far" in asserting that a pre-existing condition precludes application of the sudden onset doctrine. In *Berten*, the plaintiff claimed injuries resulting from a collision in which her automobile struck a hog. Although she had been similarly injured in a car accident approximately a year before, the court held that, because her condition had improved since the first accident and was good on the eve of the second accident, the sudden onset rule applied to plaintiff's injuries other than those which could not likely be related to the second collision. *Id.* at 686-7.

The facts of the present case are far more similar to those of *Berten*. The undisputed facts show that plaintiff was able to walk to the patrol wagon, climb into the passenger compartment and sit on one of the bench seats. The facts further indicate that plaintiff stood up and fell during his ride in the patrol wagon and that he subsequently struck his head against the steel front wall of the wagon body. Plaintiff has testified that after he hit his head he never moved again. The undisputed facts show that when the patrol wagon arrived at the police station, plaintiff asserted he was unable to move and the only voluntary movement Officer Trusler observed was of plaintiff's neck and head. Furthermore, the testimony of defendant's expert, Dr. Batnizky, is that some physical trauma causing hyperextension caused plaintiff's injury; paralysis would not naturally occur as a result of plaintiff's preexisting condition. Thus, plaintiff's pre-existing back problem does not preclude application of the sudden onset doctrine.

The Knapheide defendants also contend that the doctrine is inapplicable because a number of intervening factors could

have caused plaintiff's injuries. Defendants assert that, prior to being transported in the patrol wagon, plaintiff was assaulted, involved in a fight with two women, hit on the head with a bottle, and fell on the floor in the liquor store where he was arrested. Plaintiff, however, has testified that he was not assaulted or engaged in a fight with any women, that he was not struck on the head with a bottle, and that he never fell inside the liquor store. Although he has admitted an altercation with two women, his testimony indicates that the only physical engagement occurred when plaintiff hit one woman and grabbed the other's leg to pull her to the floor. Thus, there exists a genuine issue of material fact as the intervening factors which need to be decided before a determination can be made regarding the applicability of the sudden onset doctrine.[16]

The Knapheide defendants also argue that they are entitled to summary judgment because plaintiff cannot prove "but for" causation. Under Missouri law, plaintiff must prove that his injury would not have occurred if the patrol wagon was equipped with seat belts. *See Martin v. City of Washington*,

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[16] Even if the doctrine does not apply, the Knapheide defendants are not entitled to summary judgment. Plaintiff has presented expert testimony from Albert Burstein, Ph.D., a doctor of philosophy in mechanical engineering. Defendants contend that his testimony is insufficient to satisfy plaintiff's burden of providing expert medical testimony. Defendants have not cited, and the court is not aware of, any Missouri cases distinguishing competent medical testimony from incompetent testimony on the basis of whether the expert has received an M.D. Dr. Burstein appears to be expert on application of mechanical engineering to the human muscular-skeletal system. He has taught orthopedic surgeons and is an attending orthopaedic surgeon, has published numerous books and articles on the biomechanics of various body parts, including the spine, and has designed a model of the head and neck for use in crash testing dummies. Dr. Burstein's testimony adequately establishes a genuine issue of material fact regarding the causal relationship between plaintiff's paralysis and his head striking the patrol wagon wall.

848 S.W.2d 487, 493 (Mo. banc 1993). Defendants contend that plaintiff cannot prove that his injury would not have occurred had he been restrained in seat belts, that he would have been placed in seat belts even if seat belts were installed in the wagon, and that plaintiff would have remained buckled in a seat belt if originally placed in one.

Dr. Burstein has testified that he believes plaintiff's injury occurred when plaintiff struck his head against the front of the patrol wagon and that the injury would not have occurred if the floor of the patrol wagon had been made of different material or if plaintiff had been wearing a seat belt. Plaintiff has testified that, because he was not the wagon's driver and therefore not in control of the wagon, he would have worn a seat belt had he been placed in one. This contention is bolstered by plaintiff's testimony that he lay down on the floor of the wagon because the ride was rough and he thought this would be the safest position. Thus, there are genuine factual disputes on each of these points.

The question of whether plaintiff would have been placed in a seat belt, had they been installed, is necessarily more difficult to determine because, of course, there were no seat belts. Plaintiff's contention that he would have been placed in a seat belt is thus necessarily more speculative. Under the circumstances, however, he has created a genuine issue of fact precluding summary judgment. Defendants point out that the police procedures in place in January 1992, which called for police officers to place prisoners on the floor of the wagon or to advise prisoners to sit on the floor or at the front of the wagon, would have allowed police officers to place a prisoner on the floor regardless of whether or not there were seat belts in the wagon. The purpose behind these procedures was, as stated in police policy, to protect prisoners from falling or being thrown against the sides of the wagon. Later in 1992, once the wagons were equipped with seat belts, police policy required

that the officers ensure that prisoners were restrained by seat belts. There is thus a strong inference that plaintiff would have been restrained had there been belts in the wagon. Accordingly, summary judgement will not be granted on this basis.

***Negligent Failure to Recall or Retrofit***

Plaintiff has withdrawn his claims based on failure to recall or retrofit the wagon bodies. Accordingly, summary judgement is appropriate on Counts III and X of his Complaint.

For the above reasons, it is hereby

ORDERED that the Board of Police Commissioners' Motion for Partial Summary Judgment is GRANTED on Counts VI and VII. The Clerk of the Court is directed to enter judgment in favor of the Board on Counts VI and VII of plaintiff's Complaint. It is further

ORDERED that Knapheide Truck Equipment and Knapheide Manufacturing's Motion for Summary Judgment is GRANTED in part and DENIED in part. Summary judgment is granted on counts II, III, IX and X s to both defendants. The Clerk of the Court is directed to enter judgment for these defendants on the above counts.[17]

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

Dated: June 17, 1997.

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[17] It may be useful for clarification and possible settlement purposes for me to indicate that the Knapheide rulings are considered to be quite close, both on factual and legal issues, that I believe plaintiff is proceeding on thin ice, which could break at or after trial, except as to third party defendant Trusler, who is not targeted by plaintiff. The denial of summary judgment as to the Knapheide defendants is a discretionary ruling, under *Roberts v. Browning*, 610 F.2d 528 (8th Cir. 1979).

## APPENDIX C

## United States Court of Appeals
## FOR THE EIGHTH CIRCUIT

No. 98-3717WMKC

Joseph L. Spencer,
Plaintiff-Appellant,

v.

The Board of Police Commissioners of the
Kansas City, Missouri Police Department, etc.,
Defendants-Appellees.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

September 13, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit